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Supreme Court of the United States

APRIL TERM, 1981

BARRY G. TEDESCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

AMMENDED

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Supreme Court of the United States

APRIL TERM, 1981

No. 80-1161

BARRY G. TEDESCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

AMENDED

Petition for Writ of Certiorari.

Petitioner applies for a Writ of Certiorari and in support of its application states:

QUESTIONS PRESENTED

1. Whether venue existed in the United States District Court For the District of Massachusetts under *Title 18, United States Code, Section 1503* for an endeavor to obstruct justice in a criminal case pending in that court when no overt act occurred within said district or in the State of Massachusetts.

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Supreme Court of the United States

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BARRY G. TEDESCO,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINIONS BELOW

The Court of Appeals affirmed the judgment of the United States District Court in a written decision, No. 80-1161, dated December 2, 1980. The December 2, 1980 opinion of the Court of Appeals is reprinted at Pet. App. A, infra, p.

JURISDICTION

The judgment of the Court of Appeals was entered on

December 2, 1980 (Pet. App. A, infra, pp.). On December 29, 1980, the Court of Appeals denied a timely Petition for Rehearing and Determination En Banc (Pet. App. B, pp.). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1) and Rule 38 (b) of the Federal Rules of Criminal Procedure.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which *district* shall have been previously ascertained by law...."

Article 3, Section 2, Clause 3, United States Constitution states:

> "The trial of all crimes, except in cases of Impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed..."

STATUTES INVOLVED

Rule 18, Rules of Criminal Procedure states:

> "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."

STATEMENT OF THE CASE

The Petitioner, BARRY G. TEDESCO was charged in a one count indictment of having violated *Title 18, United States Code, Section 1503*, by endeavoring to influence the testimony of a witness who was to testify in a criminal case pending in the United States District Court, District of Massachusetts.

It is uncontroverted that the alleged endeavor occurred in the State of Connecticut and that no overt act occurred within the territorial jurisdiction of the United States District Court for the District of Massachusetts.

Prior to trial the Petitioner objected to the venue of the trial being in the District of Massachusetts. The objection was overruled and the Petitioner was found guilty after a jury trial, the Honorable Frank H. Freedman presiding. On February 20, 1980, the Petitioner was sentenced to one year imprisonment, the first ninety days to be served. The balance of the sentence was suspended and the Petitioner was placed on probation for a period of two years.

REASON FOR GRANTING THE WRIT

The Petitioner relying on the case of *United States* v. *Swann*, 441, F. 2d 1053 (U.S. Court of Appeals, Dist. of Columbia Cir. 1971); made a pretrial motion to dismiss the indictment for

improper venue. The government opposed the motion relying upon the case of *United States* v. *O'Donnell*, 510 F. 2d 1190 (6th Cir. 1975). The Court denied the Petitioner's motion.

Both venue and territorial jurisdiction of a federal district court in criminal cases depend on some part of the criminal activity having occurred within its territory. *United States* v. *Luton*, 486 F. 2d 1021 (5th Cir. 1974); *United States* v. *Bittoney*, 472 F. 2d 16 (2d Cir. 1973). It is public policy of the United States that one must not arbitrarily be sent without his consent, into a strange locality to defend himself against powerful prosecutorial resources of the government. *Dupont* v. *United States*, 338 F. 2d 39 (5th Cir. 1967).

It was the government's contention that the crime was committed in the District of Massachusetts as it was that District where the administration of justice was intended to be obstructed or impeded (See: *United States v. O'Donnell*, Supra). The Court in *United States* v. *O'Donnell*, Supra, interpreted *Title 18 United States Code, Section 1503*, as a statute dealing with "constructive contempt" and then held that a Court should have the power to deal with contempts of its own authority. It was therefore, the holding of the court in *United States* v. *O'Donnell*, Supra, that a defendant could be tried in the District where the administration of justice was intended to be obstructed or impeded even though no overt act occurred in that District.

In the case of *United States* v. *Swann*, Supra, the defendant was tried in the District of Columbia for violating *Title 18 United States Code, Section 1503*. A criminal case was pending in the District of Columbia. The defendant assaulted a witness in the District of Maryland who was to testify in the case pending in the District of Columbia. The Court held that the fact that the victim of the assault was a witness in a case pending in the District of Columbia and that the defendant hoped to affect her testimony did not establish venue in the District of Columbia. The Court in the *Swann* case stated:

> "If it were otherwise then by the same reasoning the prosecution of a bribery case under *Title 18, United States Code, Section 201,* might be had in the jurisdiction where the prospective witness is to testify, and where his testimony might be affected, no matter where the bribe is passed or the attempt to bribe is made. This is not the law. See *In Re Polliser*, 136 U.S. 257, 10 S Ct. 1034, (1890); *United States* v. *Michelson*, 165 F. 2d 732 (2d Cir. 1948).

In the *Swann* case, supra; in a concurring opinion, Judge Tamm distinguished between "endeavoring" to obstruct justice and "actually" obstructing justice. Judge Tamm stated:

> "This case was endeavoring to intimidate a witness. Appellant was charged with only an attempt to influence the administration of justice. The attempt was begun and completed in Maryland. As a result, venue is only Maryland." Judge Tamm then stated that the result might be different if the defendant was tried for actually obstructing justice in the District of Columbia.

In the case of *United States* v. *Bachert*, 449 F. Supp. 509 (U.S. Dist. Ct. E.D. Penn. 1978), the court dismissed an indictment charging the defendant with "endeavoring" to obstruct justice for improper venue as the acts constituting the alleged violation took place entirely within the Middle District

of Pennsylvania and the defendant was to be tried in the Eastern District of Pennsylvania. The Court held that venue was proper only in the Middle District of Pennsylvania even though the "Administration of Justice" sought to be impeded was located in the Eastern District of Pennsylvania. The Court considered the decisions in the cases of *United States* v. *Swann*, Supra; and *United States* v. *O'Donnell,* Supra; and stated that it agreed with the reasoning in the *Swann* case. The court also considered Judge Tamm's concurrence in the *Swann* case and said that his concurrence distinguished between the offenses of "endeavoring to obstruct justice," which is basically an attempt crime, and "obstruction of justice." The Court stated that "in the latter case, Judge Tamm suggested that venue might properly lie in the district where the administration of justice is impeded. The defendant here, however, is charged with "endeavoring to obstruct justice." The acts constituting the alleged violation took place entirely within the "Middle District of Pennsylvania." Finally the Court stated:

> "We have carefully considered the case of *United States* v. *O'Donnell*, 510 F. 2d 1190 (6th Cir. 1975), which holds otherwise, but find the reasoning there to be unpersuasive."

In the case of *United States* v. *Nadolny*, 601 F. 2d 940 (7th Cir. 1979), the defendant was indicted for obstructing a criminal investigation in violation of *Title 18, United States Code Section 1510.* The acts constituting the alleged obstruction occurred in the Southern District of Illinois. The criminal investigation which it is alleged the defendant attempted to obstruct was proceeding in the Eastern District of Illinois where the defendant was tried. In the district court the defendant moved to dismiss the indictment for improper venue.

The government argued that the gravamen of the Section 1510 offense is the effect of the misconduct on the administration of justice, and accordingly proper venue was laid in the Eastern District. In support of its argument, the government relied on *United States* v. *O'Donnell*, Supra. The District Court denied the defendant's motion to dismiss. The Court of Appeals reversed. The Court of Appeals stated:

> "After careful consideration of *O'Donnell*, we find the reasoning in *United States* v. *Swann*, 142 U.S. App. D.C. 36 S 441 F. 2d 1053 (1971) more appropriately analogized to Section 1510 prosecutions."

The Court held that the gravamen of the offense was the beating, that being the same position adopted in the *Swann* case. The Court also relied on *United States* v. *Bachert*, Supra, and rejected *O'Donnell* and adopted *Swann*.

The Court in *United States* v. *Nadolny*, Supra, said that the words of *Rule 18* and the *Sixth Amendment* taken on their face, also indicate clearly that an accused cannot be tried in one district for an offense committed in another. The *Nadolny* Court said that the government's argument strays too far from the original basis of our venue laws. Venue traditionally has been based on notions of fair, fast and efficient administration of trials. When venue is laid in the proper district—the one in which the crime was committed-witnesses are more readily available, and the operative facts and situs of the incident are closer at hand. The accused gets the trial by local jury envisioned by the framers of the *Sixth Amendment*.

At page 943, note 2 the *Nadolny* Court stated:

> "Carrying the government's argument to its extreme, one could

> visualize a Section 1510 Criminal trial in West Virginia (situs of an investigation) when the beating of an informant in the investigation took place in Anchorage, Alaska."

The Court, relying upon the case of *United States* v. *O'Donnell*, Supra, held that venue lies in the intended place of impact of the attempted obstruction of justice rather than at the place of the act which constituted the attempt. It reached this conclusion after examining the legislative history of *Title 18, United States Code, Section 1503* and concluding that the source of this Section is the *Act of March 2, 1831, 4 Stat. 487*, which outlined the contempt jurisdiction of federal courts.

The cases of *United States* v. *Bachert*, Supra; and *United States* v. *Nadolny*, Supra, addressed themselves directly to the case of *United States* v. *O'Donnell*, Supra, and held to the contrary" finding the reasoning in that case unpersuasive.

The circuits are now split on the question. The United States Court of Appeals for the District of Columbia; the Seventh Circuit and the Second Circuit (*United States* v. *Brothman*, 191 F 2d 70 (2d Cir. 1951), all holding that venue lies in the location of the act. The Sixth Circuit holds that venue lies in the place of intended impact.

This Court in adopting the reasoning in *United States* v. *O'Donnell*, Supra; failed to take into account the differences between the *Act of March 2, 1831, 4 Stat 487* and *Title 18, United States Code Section 1503*. The Court also failed to take into account that the contempt jurisdiction of the federal courts is now set forth in *Title 18 United States Code, Section 401, Title 18, United States Code Section 402; Title 18, United States Code, Section 3691* and *Rule 42 of the Federal Rules of Criminal Procedure.*

Title 18, United States Code, Section 1503, unlike the *Act of March 2, 1831, 4 Stat. 487* is also a *"reprisal statute"* and is

intended to protect witnesses from reprisal for having testified as a witness even years after such testimony and although a case is no longer pending in any federal court and when no jurisdiction exists in the case in which said witness testified.

The decision in this case will cause uncertainty and open the door to multiple prosecutions in cases where a witness or witnesses are testifying or about to testify in different federal jurisdictions against the same defendant or defendants. An example is the current ABSCAM cases where the same government witnesses will testify against the same defendants in Federal Courts in New York, New Jersey, Washington, D. C. and Florida.

The Constitution determines the venue of the trial in terms of the place where the crime has been committed. It does not furnish any guidance for determining the place of the crime. The Court of Appeals in the case at bar has in effect determined that the place of the crime is the place of intended impact rather than the place where the overt act occurred. The problems with this determination are manifest as hereinbefore set forth.

Most crimes have impact in many different jurisdictions and in many different ways. The "impact" theory of determining venue will cause only confusion and uncertainty and should not be applied where the place of overt act constituting the crime is known and well defined.

The Court of Appeals should not have exempted the crime of obstruction of justice from the application of the United States Constitution and *Rule 18 of the Federal Rules of Criminal Procedure*. The anti-reprisal provisions of *Title 18, United States Code, Section 1503*, are operative even if there is no case pending in a federal district court. An attack on a witness long after he testified and after the case in which he testified is no longer pending cannot be deemed an "obstruction of justice" or "constructive contempt." Certainly in such a case, the district in which the attack occurred would be the proper venue

for trail.

The impact theory of venue is unrealistic and can only cause confusion and uncertainty as to the proper venue for a trial. The district in which a violent act, threat or bribe occurs is readily ascertainable and certainly the community in said district has a vested interest in prosecuting such conduct which occurs within its boundaries.The impact theory is artifical and subject to the fact that an act in one district can and generally does have impact in many different districts. The decision of the Court of Appeals in this case fails to state any reason that the provisions and protections set forth in the *Sixth Amendment, United States Constitution; Article 3, Section 2, Clause 3, United States Consitution* and *Rule 18, Rules of Criminal Procedure* should not be applicable to prosecutions under *Title 18, United States Code, Section 1503*. These provisions were promulgated to protect a basic right of the individual and should not be evaded simply to find a reason for conferring venue in one district when a trial in the district where the criminal act is alleged to have taken place protects the right of the individual to a trial which is generally more convenient to himself and the witnesses and protects the right of that community to prosecute criminal acts that occur within its territorial jurisdiction.

The decision of the court in this case raises substantial constitutional issues and creates new issues which this court will have to address in the future.

The case of *United States* v. *O'Donnell*, Supra, was clearly erroneous when, for purposes of venue, it equated the contempt statutes with *Title 18, United States Code, Section 1503*. The cases of *United States* v. *Swann*, Supra; *United States* v. *Bachert*, Supra; *United States* v. *Nadolny*, Supra; and *United States* v. *Brothman*, Supra; correctly sets forth the venue provisions applicable to a trial on an indictment which alleges a violation of *Title 18, United States Code, Section 1503*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectively submitted,

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April 24, 1981

Appendices

United States Court of Appeals
For the First Circuit

No. 80-1161

UNITED STATES OF AMERICA,

APPELLEE,

v.

BARRY G. TEDESCO,

DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK H. FREEDMAN, *U.S. District Judge*]

Before
CAMPBELL and BOWNES, *Circuit Judges*,
NELSON,* *District Judge*.

Morton Berger for appellant.
Paul E. Troy, Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, was on brief, for appellee.

December 2, 1980

BOWNES, *Circuit Judge*. Appellant Barry G. Tedesco appeals his conviction under 18 U.S.C. § 1503[1] for corruptly endeavoring to influence, obstruct, and impede the due administration of justice in the United States District Court for the District of Massachusetts. He claims both that the district

* Of the District of Massachusetts, sitting by designation.

[1] Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any

court improperly denied his motion to dismiss the indictment for improper venue and that the verdict is not supported by substantial evidence. For the reasons stated below, we affirm the judgment of the district court.

FACTS

In its indictment the Government alleged that Tedesco violated 18 U.S.C. § 1503 by endeavoring to induce a witness not to testify fully and completely about certain matters that might inculpate the defendant Benjamin De Magistris in his then pending trial in the United States District Court for the District of Massachusetts. The facts are basically undisputed. The witness, John Makris, was a "Star Route" contractor[2] who transported mail from Yonkers, New York. In early 1978 he received a number of solicitations to bid on Star Routes originating in Connecticut. He applied for a bond and bid on five or six of the routes, but was not awarded any of them. He then lodged a complaint with the United States Postal Service

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grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injuries any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such a juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c.645, 62 Stat. 769.

[2] The Government notes in its brief that much of the mail in the United States is carried by civilians pursuant to Highway Contract Route Contracts, which are commonly referred to as "Star Routes."

alleging irregularities in the bonding procedures for postal routes.[3] In May of 1979 Makris testified before the grand jury, which ultimately returned a 17-count conspiracy and fraud indictment against De Magistris, whose company had been awarded several of the Connecticut routes, and a codefendant.

In late October or early November of 1979, Tedesco, also a Star Route driver, saw Makris on the loading platform at the Mount Vernon Management Sectional Center of the United States Postal Service. Tedesco stated that Makris had De Magistris "in a very good position" and that De Magistris "could do a lot" for him. Tedesco also said that as a friend of both Makris and De Magistris, he felt caught in the middle.

On the evening of November 5, 1979, Tedesco called Makris at his home in Yonkers, New York. He reiterated that Makris had De Magistris in a "very good position" and that De Magistris "could do a lot" for him. He suggested that Makris speak to De Magistris, but Makris refused. Tedesco then suggested that he and Makris meet because he could not talk on the telephone, but no specific arrangements were made at that time. Later that eveing, Makris called Postal Inspector McDonough, case agent in the *De Magistris* case.

The next day, Makris' truck broke down. Makris called the appellant to ask if he could rent or borrow a truck. Tedesco explained that he did not have any spare equipment, but he did make arrangements to meet Makris in Millville, New York on the morning of November 8, 1979. At this meeting Tedesco again repeated that De Magistris "could do a lot" for Makris. He spelled out what he meant: De Magistris could get equipment for Makris, arrange the trade-in, buying, and financing of a truck without any money down, subcontract to him a contract the Makris had hoped to obtain and "supply the trucks

[3] Makris indicated in his testimony the he believed that De Magistris paid off the bonding companies to discover the lowest bids.

and the drivers and pay them" until Makris was able to do so. Tedesco then suggested that Makris meet with De Magistris' attorney and review his testimony. Makris replied that he would not change his testimony or perjure himself. Tedesco then said " '[h]e [De Magistris] knows you have to testify. He doesn't want you to perjure yourself or change your testimony' — just if you have anything solid against him, you know, not to add any more wood to the fire." Makris, who testified that he had told the *De Magistris* grand jury all that he knew, assured Tedesco that he would not "add any more wood to the fire." Makris also testified that he understood Tedesco's comment about not adding "more wood to the fire" to mean that he should not reveal at trial any information he had not previously given to the grand jury.

Makris called Inspector McDonough after the meeting with Tedesco. On November 9, McDonough attached a tape recorder pickup to Makris' telephone.[4] Makris then called Tedesco. During this conversation, which was played for the jury, Tedesco again said that there were a lot of things De Magistris could do for Makris, that he thought De Magistris did not want any more wood added to the fire and that, if Makris had some solid information against De Magistris, he should "hold back on it." He also discussed the subcontract originally brought up during the meeting on November 8.

Postal Inspector McDonough arrested appellant on November 10. According to the Inspector's testimony,

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[4] Makris initially refused to allow the recording device to be attached to his telephone. According to his testimony, which the testimony of the Inspector tended to contradict, he agreed to the recording only after McDonough presented him with a subpoena to testify before the grand jury in Boston and after McDonough informed him that Tedesco would be arrested immediately unless Makris agreed to have the device put on his telephone. Makris testified that appearing before the grand jury in Boston would cause him to lose time from work and that he did not want Tedesco arrested at that time because Tedesco's wife had just given birth and was still hospitalized.

Tedesco, after being advised of his *Miranda* rights, told him that he did not know of De Magistris' indictment or arrest and had not contacted and would not contact Makris concerning his testimony in the upcoming trial. At this point McDonough played a portion of the telephone conversation recorded the previous day. Tedesco then stated that both Makris and De Magistris were his friends and that he wanted to help them both: Makris needed money and De Magistris needed favorable testimony. He admitted that he did attempt to have Makris alter his testimony or withhold damaging information, but stated that at the time he did not understand the implications of his actions.

VENUE

Tedesco was tried and convicted in the United States District Court for the District of Massachusetts for corruptly endeavoring to influence, obstruct, and impede the due administration of justice in that district. He challenges venue on the undisputed ground that there was no attempt to influence the witness in Massachusetts; all attempts to influence Makris occurred in New York.

The right to be tried for a crime in the state where it was committed was deemed so important that it was enumerated twice in the Constitution. Article III, section 2, clause 3 provides that "[t]he trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." Under the sixth amendment, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." This safeguard is also reflected in Rule 18 of the Federal Rules of Criminal Procedure, which states that "[e]xcept as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."

Although the Constitution determines the venue of the trial in terms of the place where the crime has been committed, it does not furnish any guidance for determining the place of the crime. *Johnston* v. *United States*, 351 U.S. 215, 220 (1956). The statute under which appellant was indicted, 18 U.S.C. § 1503, does not specify the situs of the crime. The Supreme Court has ruled that when "Congress is not explicit, 'the *locus delecti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it.' " *Travis* v. *United States*, 364 U.S. 631, 635 (1961) (quoting *United States* v. *Anderson*, 328 U.S. 699, 703 (1946)); *accord*, *United States* v. *Roche*, 611 F.2d 1180, 1182 (6th Cir. 1980); *United States* v. *Chestnut*, 533 F.2d 40, 46 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976). One method of making this determination is by examining the key verbs in the statute defining the criminal offense. *United States* v. *Chestnut*, 533 F.2d at 46-47; *United States* v. *Bithoney*, 472 F.2d 16, 23 (2d Cir.), *cert. denied*, 412 U.S. 938 (1973); C. Wright, Law of Federal Courts § 43 (3d ed. 1976). The pertinent part of section 1503 provides that "[w]hoever . . . corruptly or by threats or force, or by any threatening letter or communication, *influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice*, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1503 (emphasis added). The words of section 1503 indicate that Congress was concerned not with the place where the threats or offers of money or other benefits were made, but with the effect such threats or bribes might have on a witness testifying in a particular proceeding. The very nature of the crime is affecting, or endeavoring to affect, the due administration of justice; the activities prohibited under the statute are those intended to influence the administration of justice where the affected judicial proceeding is being held or has been held.

This conclusion is bolstered by the legislative history of 18 U.S.C. § 1503. The source of this section is the Act of March 2, 1831, 4 Stat. 487, which outlined the contempt jurisdiction of the federal courts. *United States* v. *Griffin*, 589 F.2d 200, 204 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979); *United States* v. *O'Donnell*, 510 F.2d 1190, 1194 (6th Cir.), *cert. denied*, 421 U.S. 1001 (1975); *United States* v. *Essex*, 407 F.2d 214, 216 (6th Cir. 1969). Section 1 of the Act of March 2, 1831, now codified at 18 U.S.C. § 401, allowed summary punishment for contemptuous behavior in or near the presence of the court. *United States* v. *O'Donnell*, 510 F.2d at 1194; *United States* v. *Essex*, 407 F.2d at 216. Section 2 of the 1831 Act, the predecessor of section 1503, permitted punishment of contempt occurring outside the presence of the court only after indictment and trial. *United States* v. *Griffin*, 589 F.2d at 204; *United States* v. *O'Donnell*, 510 F.2d at 1194-95; *United States* v. *Essex*, 407 F.2d at 216-17.

The Sixth Circuit, one of the few circuit courts to consider a similar venue issue, concluded that violations of section 1503 are contempts "punishable by the court whose authority is challenged regardless of where the contemptuous acts may have occurred." *United States* v. *O'Donnell*, 510 F.2d at 1195. In *O'Donnell* the defendant was indicted in the Western District of Tennessee under section 1503 for attempting to influence the testimony of a Government witness in a mail fraud case pending against defendant in that district. *Id.* at 1191. O'Donnell had attempted to have this witness murdered; all steps taken toward this end occurred in the Northern District of Texas. *Id.* at 1192. The court decided that this would not preclude venue in the Western District of Tennessee, which was the only district in which O'Donnell's efforts to obstruct justice could have been realized. *Id.* at 1193.[5] We find this analysis persuasive.

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[5] The *O'Donnell* court specifically did not decide whether venue might also lie in the Northern District of Texas. *Id.* at 1193. Similarly we do not decide the interesting issue of whether venue in the

Appellant relies heavily on the decision of the United States Court of Appeals for the District of Columbia Circuit in *United States* v. *Swann*, 441 F.2d 1053 (D.C. Cir. 1971). In *Swann* the defendant assaulted a witness in Maryland who had testified against him at a preliminary hearing in the District of Columbia. *Id.* at 1054. Swann was subsequently indicted and convicted for this assault in the District of Columbia under 18 U.S.C. § 1503. *Id.* The *Swann* court reversed the judgment of conviction with directions to dismiss the indictment *Id.* at 1056. In so ruling, it rejected the district court's decision that the assault affected the due administration of justice in the District of Columbia and so was an offense begun in one district and completed in another.[6] *Id.* at 1055. The court of appeals decided that the offense was not begun in one district and completed in another or committed in more than one district, but was begun, carried out, and committed in Maryland. *Id.* We believe that the *Swann* court erred in failing to recognize that section 1503 was intended to allow a court to reach "constructive" contempts committed outside its presence. This failure to consider the purpose of section 1503 caused the *Swann* court to misconstrue the nature of the offense prohibited by section 1503.

For the same reason, we are not persuaded by the decision of the Second Circuit in *United States* v. *Brothman*, 191 F.2d 70 (2d Cir. 1951).[7] In *Brothman* it was conceded that all of the

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district in which the communications at issue here were made would also be proper.

[6] The district court in *Swann* had ruled that venue in the District of Columbia was proper under 18 U.S.C. § 3237(a), which provides that: "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

[7] *Brothman* was decided under 18 U.S.C. § 241, which is now codified at 18 U.S.C. § 1503.

defendant's efforts to persuade a witness to give false testimony before a federal grand jury sitting in the Southern District of New York occurred in the Eastern District of New York. *Id.* at 72. The court found that Brothman had not waived his objection to venue in the Southern District and reversed his conviction, *id.*, without any analysis about why venue lay in the Eastern rather than in the Southern District. We hold that venue under section 1503 is to be determined by focusing on which court is affected by the attempt to influence, obstruct, or impede the due administration of justice. It is the impact of the acts, not their location, that controls.

SUFFICIENCY OF THE EVIDENCE

The appellant also contends that the trial court improperly denied his motion for a judgment of acquittal. Thus we must consider whether the evidence as a whole, considered in the light most favorable to the Government, together with all legitimate inferences to be drawn from it, was clearly sufficient to sustain appellant's conviction by the jury. *United States* v. *Doran*, 483 F.2d 369, 372 (1st Cir. 1973), *cert. denied*, 416 U.S. 906 (1974).

The key point of Tedesco's challenge is that, on the facts, he did not endeavor to influence a witness because he made no explicit offer of a bribe or request for specific testimony. This argument does not withstand scrutiny. The three elements of the crime for which Tedesco was convicted are (1) endeavoring to (2) corruptly (3) influence any witness in any court of the United States or influence the due administration of justice. *See United States* v. *Fasolino*, 586 F.2d 939, 940 (2d Cir. 1978) (per curiam) (conviction under section 1503 for requesting county jury commisioner to approach sentencing judge). We have previously ruled that " 'endeavor' connotes a somewhat lower threshhold of purposeful activity than 'attempt.' " *United States* v. *Lazzerini*, 611 F.2d 940, 941 (1st Cir. 1979). In *Lazzerini* the appellant was convicted under section 1503 for asking his employee and former housemate

several times to discuss with her sister a trial in which the sister was a juror. On Lazzerini's instructions, his employee told her sister that the defendant was a friend of hers, a "nice guy," and innocent. We stated, quoting *United States* v. *Roe*, 529 F.2d 629, 632 (4th Cir. 1975), "the fact that the effort to influence was subtle or circuitous" made no difference. "If reasonable jurors could conclude, from the circumstances of the conversation, that the defendant had sought, however cleverly and with whatever cloaking of purpose, to influence improperly a juror, the offense was complete." 611 F.2d at 941. This reasoning applies with equal force to Tedesco's words here. Considering the circumstances under which Tedesco approached Makris as well as what he said, there were ample grounds for a finding of endeavoring to influence a witness corruptly.

The endeavor also need not be successful. *United States* v. *Cioffi*, 493 F.2d 1111, 1119 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974); *see United States* v. *Roe*, 529 F.2d at 632 (discussing section 1503 in context of corruptly endeavoring to influence petit juror); *cf. United States* v. *Russell*, 255 U.S. 138, 143 (1921) (upholding conviction for corruptly endeavoring to influence petit juror under predecessor statute, section 135 of Criminal Code). Thus the fact that Makris might already have revealed all he knew to the grand jury does not affect the issue of the appellant's guilt or innocence.

Makris was a witness within the meaning of section 1503. A witness has been defined as one who knows or is supposed to know material facts and who is expected to be called on to testify to them. *United States* v. *Chandler*, 604 F.2d 972, 974 (5th Cir. 1979), *cert. dismissed*, 100 S. Ct. 1074 (1980). The parties have stipulated that during the time that Tedesco contacted Makris with regard to his testimony, *United States* v. *De Magistris* was a pending case in the United States District Court for the District of Massachusetts.

An effort to alter the testimony of a witness for corrupt purposes is plainly an endeavor to impede the due administration of justice. *Anderson* v. *United States*, 215 F.2d 84, 87-88 (6th Cir.), *cert. denied*, 348 U.S. 888 (1954).

In considering the facts already outlined in light of the applicable law, it is clear that the conviction must be sustained.

Affirmed.

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Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1161.

UNITED STATES OF AMERICA,
Appellee,

v.

BARRY TEDESCO,
Defendant, Appellant.

Before COFFIN, Chief Judge,
CAMPBELL and BOWNES, Circuit Judges,
and NELSON, *District Judge.

ORDER OF COURT

Entered: December 29, 1980

Upon consideration of " Petition for REhearing and Determination En Banc", which document was submitted to the members of the panel and to the judges of the Court who are in regular active service; and

The judges of the panel having voted to deny the petition for rehearing, and the judges of the Court who are in regular active service having voted against rehearing en banc,

IT is ordered that said application for hearing en banc is hereby denied.

By the Court:

[illegible] HELUP

Clerk.

Of the District of Massachusetts, sitting by designation.

[cc: Messrs. Berger and Troy]

No. 80-1803

JUN 1
ALEXANDER L.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

BARRY G. TEDESCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

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QUESTION PRESENTED

Whether petitioner was properly prosecuted in the District of Massachusetts for endeavoring to obstruct justice in a criminal case pending in that district, when his culpable acts occurred outside that district.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-11A) is reported at 635 F. 2d 902.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1980. A petition for rehearing was denied on December 29, 1980 (Pet. App. 1B). The petition for a writ of certiorari was filed on April 29, 1981, and received by the Clerk as of February 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of endeavoring to obstruct justice in that court, in violation of 18 U.S.C. 1503. He was sentenced to imprisonment for a term of one year, with all but 90 days suspended in favor of two years' probation.

The indictment charged that petitioner endeavored to induce a witness, John Makris, not to testify fully and completely against a defendant, Benjamin De Magistris, in a criminal trial pending in the United States District Court for the District of Massachusetts. The evidence showed that petitioner, Makris, and De Magistris were independent contractors who transported mail by truck for the United States Postal Service. Makris complained about irregularities in the bidding for routes, and in May 1979 he testified before a grand jury in the District of Massachusetts, which ultimately indicted De Magistris for conspiracy and fraud (Pet. App. 2A-3A).

In late October or early November 1979 in Mount Vernon, New York, petitioner advised Makris that Makris had De Magistris "in a very good position" and that De Magistris "could do a lot" for Makris. On November 5, 1979, petitioner telephoned Makris at his home in Yonkers, New York, repeated these remarks, and suggested that Makris speak to De Magistris. When Makris refused, petitioner asked to meet with Makris. Makris then contacted a postal inspector (Pet. App. 3A).

On November 6, Makris's truck broke down. Makris called petitioner and asked to rent or borrow a truck. Petitioner arranged to meet with Makris on November 8 in Millville, New York. At this meeting petitioner told Makris that De Magistris could arrange to finance a truck for Makris without any down payment, subcontract the contract Makris had hoped to obtain, and supply trucks and drivers until Makris could afford them. Petitioner also suggested that Makris meet with De Magistris's attorney and review his testimony. Makris said that he would not perjure himself or change his testimony. Petitioner replied that De Magistris did not want him to perjure himself or change his testimony, "just if you have anything solid against him, you know, not to add any more wood to the

fire." Makris again called the postal inspector and on the following day recorded a telephone conversation with petitioner. In this conversation petitioner said that if Makris had solid information on De Magistris, he should "hold back on it" and again mentioned the subcontract (Pet. App. 3A-4A). On November 10, petitioner was arrested and advised of his *Miranda* rights. Petitioner first said that he had not contacted Makris concerning his testimony. The postal inspector then played the taped conversation, whereupon petitioner admitted that he attempted to have Makris alter his testimony and withhold damaging information (Pet. App. 4A-5A).

Petitioner's motion to dismiss the indictment for improper venue was denied. On appeal, petitioner again claimed that venue was improper.[1] The court of appeals, expressly following *United States* v. *O'Donnell*, 510 F. 2d 1190 (6th Cir.), cert. denied, 421 U.S. 1001 (1975), rejected this claim (Pet. App. 1A-2A, 6A-9A).

ARGUMENT

1. Article III, Section 2, of the Constitution and the Sixth Amendment give criminal defendants the right to be tried "in the State" and "district wherein the crime shall have been committed * * *."[2] But, at least within certain limits (see *Johnston* v. *United States*, 351 U.S. 215, 220-222 (1956); *Armour Packing Co.* v. *United States*, 209 U.S. 56, 76-77 (1908)), Congress, by its definition of the offense, establishes where the crime was committed; "[w]here Congress is not explicit, 'the *locus delicti* must be determined

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[1] He also asserted that the evidence was insufficient to support his conviction. The court of appeals rejected this contention (Pet. App. 9A), and petitioner does not renew it here.

[2] In addition, Fed. R. Crim. P. 18 provides in part: "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."

from the nature of the crime alleged and the location of the act or acts constituting it.' " *Travis* v. *United States*, 364 U.S. 631, 635 (1961), quoting *United States* v. *Anderson*, 328 U.S. 699, 703 (1946). Moreover, it is settled that "[t]he constitutional requirement is as to the locality of the offense and not the personal presence of the offender." *Armour Packing Co.* v. *United States, supra*, 209 U.S. at 76; see *Travis* v. *United States, supra*, 364 U.S. at 634; *Strassheim* v. *Daily*, 221 U.S. 280, 285 (1911).

Judged by these standards, the decision of the court of appeals was clearly correct.[3] As this Court has explained (*Nye* v. *United States*, 313 U.S. 33, 48-52 (1941)), the offenses described in 18 U.S.C. 1503 are, both traditionally and in Congress's view, akin to contempts of court. Section 1503 is derived from Section 2 of the Act of Mar. 2, 1831, ch. 99, 4 Stat. 488.[4] That Act was " 'declaratory of the law concerning contempts of court' " (*Nye* v. *United States, supra*, 313 U.S. at 46). Its purpose was "narrowly [to] confine[]" the "category of criminal cases which could be tried without a jury" (*id.* at 47). Section 1 permitted the summary punishment of, *inter alia*, contempts committed

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[3]It is our position that petitioner could also have been tried in the jurisdiction in which his culpable acts occurred. See 18 U.S.C. 3237 ("Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be * * * prosecuted in any district in which such offense was begun, continued, or completed."). Apparently no court of appeals has rejected this position. See Pet. App. 7A-8A n.5; *United States* v. *O'Donnell, supra*, 510 F. 2d at 1193.

[4]Section 1503 was enacted as part of the codification of Title 18 and its enactment into law. Act of June 25, 1948, ch. 645, 62 Stat. 683, 769. The Historical and Revision Note to 18 U.S.C. 1503 recites that it is "[b]ased on title 18, U.S.C., 1940 ed., § 241 * * *." In *Nye* v. *United States, supra*, 313 U.S. at 46, this Court said that 18 U.S.C. 241 derives from Section 2 of the Act of Mar. 2, 1831. The similarities in language make the derivation clear in any event.

"in the presence of the * * * court[], or so near thereto as to obstruct the administration of justice"; by contrast, the offenses specified in Section 2 were to be tried by a jury (*ibid.*). But in Congress's view, the actions proscribed by Section 2—and now by 18 U.S.C. 1503—like those specified in Section 1, were affronts to the dignity of the court that "corrupt[] the judicial process and impede[] the administration of justice" (*Nye* v. *United States, supra*, 313 U.S. at 52). There is no indication that Congress, in providing procedural safeguards for the punishment of the offenses now described by Section 1503, intended to deprive federal courts of their traditional jurisdiction over contempts, and crimes comparable to contempts, committed against them.

Other decisions of this Court support the conclusion that the United States District Court for the District of Massachusetts was an appropriate venue for the trial of the charge against petitioner. In *Travis* v. *United States, supra*, the Court held that a trial for filing a false affidavit in a matter within the jurisdiction of a federal agency could be held in Washington, D.C., where the affidavit was filed, even though the affidavit was executed and mailed in Colorado and the defendant never left Colorado.[5] *Travis* therefore suggests that a defendant charged with taking an action calculated to interfere with the processes of an official body can be prosecuted in the jurisdiction where that body sits,

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[5]This appears to have been the unanimous view of the Court. See 364 U.S. at 641 (Harlan, J., dissenting). The Court held that venue did not lie in Colorado. It reached this conclusion on the basis of a careful reading of the statute under which the defendants were prosecuted, 18 U.S.C. 1001, which prohibits only the making of false statements in a matter within the jurisdiction of an agency; the Court reasoned that the crime had not occurred until the filing was completed. See 364 U.S. at 635. The dissenters argued that venue lay in Colorado and intimated that it lay in the District of Columbia as well. See *id.* at 641.

even if the defendant does not physically enter that jurisdiction; by analogy, petitioner was properly prosecuted in Massachusetts. Similarly, in *Strassheim* v. *Daily, supra*, 221 U.S. at 285, the Court held that a state could punish a person who had defrauded the state and corrupted an official even if the defendant "never had set foot in the State until after the fraud was complete." In a passage that would apply equally to petitioner, Justice Holmes, speaking for the Court, said: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect * * *" (*ibid.*).

2. Petitioner correctly asserts (Pet. 4-10) that the United States Court of Appeals for the District of Columbia Circuit has reached a result inconsistent with that of the court below. In *United States* v. *Swann*, 441 F. 2d 1053 (D.C. Cir. 1971), the defendant was charged with violating Section 1503 by injuring a witness on account of her having testified before a grand jury in the District of Columbia and by endeavoring to intimidate her in connection with a pending trial. All of the defendant's actions occurred in Maryland. The panel reversed the defendant's convictions, holding that venue lay only in Maryland. As both the court below and the Sixth Circuit, in *United States* v. *O'Donnell, supra*, 510 F. 2d at 1193-1194, noted, the panel opinion in *Swann* fails to recognize the connection between the offenses described in Section 1503 and contempts of court. In addition, the *Swann* panel relied on cases involving offenses in which an intended effect on specific proceedings in another district was not an element (441 F. 2d at 1055). This Court denied certiorari in *O'Donnell*, and we believe that the limited importance of the issue and the possibility

that the District of Columbia Circuit will not adhere to *Swann* continue to make review unwarranted.[6]

Petitioner also cites (Pet. 6-7, 8, 10) *United States* v. *Nadolny*, 601 F. 2d 940 (7th Cir. 1979), and *United States* v. *Brothman*, 191 F. 2d 70 (2d Cir. 1951). *Nadolny* dealt with a violation of 18 U.S.C. 1510, which prohibits the obstruction of a criminal investigation. Section 1510 can be violated even if no court proceeding has begun. See, *e.g.*, *United States* v. *Cameron*, 460 F. 2d 1394, 1400-1401 (5th Cir. 1972). Criminal investigations may not be centered in one district and may occur in several districts at the same time. Consequently, the offenses described by Section 1510 are not akin to contempts of court in the same fashion as those described by Section 1503. Moreover, the Seventh Circuit has held that a prosecution under the Hobbs Act, 18 U.S.C. 1951, for obstructing interstate commerce by extortion may be brought "in any jurisdiction where commerce is affected" even if all the culpable acts occurred outside that jurisdiction. *United States* v. *Floyd*, 228 F. 2d 913, 918 (7th Cir.), cert. denied, 351 U.S. 938 (1956). By analogy, the government should be free to prosecute a violation of Section 1503 in the jurisdiction of the proceeding it affects.

Brothman was a prosecution under the predecessor of Section 1503, and the court of appeals held that venue did not lie in the district where the proceeding was pending. But the government apparently asserted only that the defendant waived his objection to venue and did not argue that venue was proper (see 191 F. 2d at 72). Consequently, the court of appeals did not discuss the merits of the venue issue or the connection between Section 1503 and contempts of court.

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[6]Since prosecutors confronting situations involving obstruction of District of Columbia proceedings are unlikely to lay charges in that district when such action would be contrary to the holding in *Swann*, there may in fact never be another case that reaches a result contrary to that in petitioner's case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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Attorney

JUNE 1981

DOJ-1981-06